

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF CONSOLIDATED UNFAIR LABOR PRACTICE CHARGE
NOS. 19-88 AND 30-88:

TEAMSTERS LOCAL UNION NO. 190;

Complainant,

- vs -

CITY OF BILLINGS,

Defendant.

FINAL ORDER

* * * * *

The Findings of Fact, Conclusions of Law and Recommended Order was issued by Hearing Examiner Arlyn Plowman on June 22, 1989.

Exceptions to the Findings of Fact, Conclusions of Law and Recommended Order were filed by D. Patrick McKittrick, attorney for the Complainant, on July 7, 1989.

Oral argument was scheduled before the Board of Personnel Appeals on September 27, 1989.

After reviewing the record, considering the briefs and oral arguments, the Board orders as follows.

1. IT IS ORDERED that the Exceptions to the Hearing Examiner's Findings of Fact, Conclusions of Law, and Recommended Order are hereby denied.

2. IT IS ORDERED that this Board therefore adopt the Findings of Fact, Conclusions of Law and Recommended Order of Hearing Examiner Arlyn Plowman as the Final Order of this Board.

1 DATED this 2nd day of October, 1989.

2 BOARD OF PERSONNEL APPEALS

3
4 By Robert A. Poore
5 Robert A. Poore
Chairman

6 * * * * *

7 CERTIFICATE OF MAILING

8 I, Janet Jacobson, do certify that a
9 true and correct copy of this document was mailed to the
following on the 4th day of October, 1989:

10 D. Patrick McKittrick
11 MCKITTRICK LAW FIRM
12 Strain Building - Suite 622
410 Central Avenue
13 P.O. Box 1184
Great Falls, MT 59403

14 Paul J. Luwe
15 Staff Attorney
City of Billings
16 City Attorney's Office
P.O. Box 1178
Billings, MT 59103-1178

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF CONSOLIDATED UNFAIR LABOR PRACTICE CHARGE
NO.'S 19-88 AND 30-88

TEAMSTERS LOCAL UNION NO. 190,)

Complainant,)

-vs-

CITY OF BILLINGS,)

Defendant.)

FINDINGS OF FACT;
CONCLUSIONS OF LAW;
RECOMMENDED ORDER

* * * * *

I. INTRODUCTION

A hearing in the above-captioned matter was held Wednesday, January 25, 1989 in the City of Billings Public Utilities Department Conference Room at 2251 Belknap Avenue, Billings, Montana. The Complainant, Teamsters Local Union No. 190 was represented by D. Patrick McKittrick. Paul Luwe represented the Defendant, City of Billings. Arlyn L. Plowman was the duly appointed Hearing Examiner for the Board of Personnel Appeals. The parties offered evidence and argument and filed post-hearing briefs. The matter was deemed submitted on May 9, 1989.

II. BACKGROUND

On August 26, 1988 the Complainant, Chauffeurs, Teamsters and Helpers Local Union No. 190 filed an Unfair Labor Practice Charge with the Board of Personnel Appeals which was labeled ULP 19-88. The Complainant charged:

Since on or about August 3, 1988, it (the

1 Defendant/Employer, City of Billings) by
2 its officers, agents or representatives
3 has refused to bargain collectively in
4 good faith with said union (Teamsters
5 Local 190), a labor organization chosen
6 by a majority of its employees in an
7 appropriate unit. Said employer has
8 refused to process through Article V-
9 Settlement of Disputes, of the extant
10 collective bargaining contract a
11 grievance over one of the benefits under
12 said contract; to wit: Heritage Day
13 holiday. Said employer has violated the
14 law including but not limited to Sections
15 39-31-305, 306, 401(5) and 201 MCA.

9 On September 8, 1988 the Defendant, City of Billings,
10 filed a timely response requesting that the charge be
11 determined to be without merit.

12 The matter was referred to a Board of Personnel Appeals
13 investigator and on October 5, 1988 an Investigation Report
14 and Determination was issued finding probable merit for the
15 charge. The Defendant filed a timely answer on October 19,
16 1988 requesting that the charge be dismissed with prejudice.

17 On October 11, 1988 Arlyn L. Plowman was appointed
18 Hearing Examiner and Notice of Pre-Hearing Conference was
19 issued on October 24, 1988.

20 On November 11, 1988 the Complainant, Chauffeurs,
21 Teamsters and Helpers Local Union No. 190 filed an Unfair
22 Labor Practice Charge with the Board of Personnel Appeals
23 which was labeled ULP 30-88. The Complainant charged:

24 On or about July 1, 1988, and
25 subsequently and continuing, it(the
Defendant/Employer, City of Billings), by

1 its officers, agents or representatives
2 has refused to bargain collectively in
3 good faith with said union (Teamsters
4 Local 190), a labor organization chosen
5 by a majority of its employees in an
6 appropriate unit. On or about August 3,
7 1988, said employer has refused to
8 process through Article V-Settlement of
9 Disputes, of the extant collective
10 bargaining contract a grievance over one
11 of the benefits under said contract; to
12 wit: Heritage Day holiday. Said
13 employer has violated the law including
14 but not limited to Sections 39-31-305,
15 306, 401(5) and 201 MCA.

9 The Defendant, City of Billings, filed a timely response
10 on November 22, 1988 in which it requested that the charge be
11 determined to be without merit, or in the alternative
12 processed as an amendment to ULP 19-88.

13 On November 29, 1988 an order was issued consolidating
14 ULP 19-88 and ULP 30-88.

15 After being rescheduled, a pre-hearing conference in the
16 above captioned matter was held by telephone on December 5,
17 1988. Notice setting the hearing for January 25, 1989 was
18 issued on December 7, 1988.

19 III. FINDINGS OF FACT

20 1. The Defendant, City of Billings, and the
21 Complainant, Teamsters Local Union No. 190, are signatory to
22 a Collective Bargaining Agreement (Exhibit J-2). That
23 Collective Bargaining Agreement or its predecessor (Exhibit
24 J-1) was in effect at all times relative to this dispute.

25 2. The July 1, 1987 through June 30, 1988 Collective

1 Bargaining Agreement (Exhibit J-2) between the parties and
2 Article V-Settlement of Disputes contains the following
3 language on pages 6 and 7:

4 ...An employee, who has a grievance,
5 shall, with or without the steward
6 present, orally discuss the grievance
7 with the supervisor. If the supervisor
8 is unable to orally resolve the
9 grievance, the employee and steward may
10 request the union to file a formal
11 grievance...

12 The grievance must be filed with the
13 Department Head, or the Personnel
14 Director, as an alternate, within fifteen
15 (15) calendar days of the grievance's
16 occurrence, or the first opportunity to
17 have reasonably had knowledge of its
18 occurrence. The Employer shall review
19 the grievance and report a grievance
20 resolution to the Union within fifteen
21 (15) calendar days of the receipt of the
22 grievance.

23 ...If the Employer's grievance resolution
24 is not satisfactory to the Union, either
25 party may request a grievance hearing to
be provided at the next Joint Labor
Management Committee. The Joint Labor
Management Committee (JLMC) shall be a
permanent standing committee composed of
an equal number of Labor and Management
representatives, but not to exceed more
than three (3) for each side. Each side
shall appoint a permanent Chairman. The
JLMC shall adopt rules or procedures to
govern the conduct of its proceedings.
Members of the JLMC shall not have a
direct conflict of interest with the
grievance being heard. After hearing the
grievance, the JLMC shall issue a final
and binding decision, subject to the
majority vote of the JLMC.

...Where the chairmen are unable to agree
or come to a decision on the grievance,

1 parties may jointly agree to submit the
2 grievance to a third party neutral
3 arbitrator, subject to the following
4 restrictions...

5 3. Article 8.4.B.10 of the 1987-89 Collective
6 Bargaining Agreement (Exhibit J-2) stated after January 1,
7 1988 Heritage Day was to be observed as a holiday on a date
8 to be determined by the City.

9 4. In January 1988, there arose, between the parties,
10 a dispute as to the implementation of the Heritage Day
11 holiday. Several letters were exchanged (Exhibit C-1, C-2,
12 C-3, and C-4) in that dispute. It was the Complainant/
13 Union's position (See Exhibit C-2) that the Heritage Day
14 holiday was to be observed before the end of the contract
15 year, July 1, 1988. The Defendant/Employer held (Exhibit C-
16 1) that the Collective Bargaining Agreement only required
17 Heritage Day to be determined and observed before the end of
18 the calendar year, December 31, 1988.

19 5. On February 9, 1988 the City Council of the City of
20 Billings adopted a resolution declaring Heritage Day to be
21 the day after Thanksgiving (Exhibit D-4).

22 6. The matter was the subject of several conversations
23 between representatives of the parties. Those discussions
24 did not resolve the dispute. On July 27, 1988 the
25 Complainant/Union filed a grievance (Exhibit D-6) alleging
that the Employer/Defendant failed to provide the Heritage

1 Day holiday as required by the Collective Bargaining
2 Agreement.

3 7. The Employer/Defendant responded to the
4 aforementioned grievance in a letter dated August 2, 1988
5 (Exhibit C-6) denying the grievance as untimely. The
6 Employer stated that the grievance should have been filed
7 within fifteen (15) days after the February 8, 1988 City
8 Council resolution Designating Heritage Day.

9 8. The Complainant/Union did not attempt to advance
10 the grievance on to the next step of the Collective
11 Bargaining Agreement grievance procedure by requesting a
12 grievance hearing at the Joint Labor Management Committee.

13 9. Inasmuch as the Complainant/Union failed to move
14 the grievance on to the next step of the grievance procedure
15 the Defendant/Employer did not refuse to process the
16 grievance as there was no request to do so.

17 10. It should be noted that the collective bargaining
18 agreement's grievance-arbitration machinery has no time
19 limits between step 1 and step 2. It is conceivable that the
20 Complainant could yet, at this late date, file a timely
21 request to move the grievance on to the second step of the
22 grievance procedure and a hearing with the Joint Labor
23 Management Committee.

24 IV. CONCLUSIONS OF LAW

25 1. The Board of Personnel Appeals has jurisdiction in

1 this matter pursuant to Section 39-31-405 et seq., MCA.

2 2. The Montana Supreme Court has approved the practice
3 of the Board of Personnel Appeals in using Federal Court and
4 National Labor Relations Board (NLRB) precedents as
5 guidelines in interpreting the Montana Collective Bargaining
6 for Public Employees Act as the state act is so similar to
7 the Federal Labor Management Relations Act, State ex. rel
8 Board of Personnel Appeals v. District Court, 183 Mont. 223,
9 598 P.2d 1117, 103 LRRM 2297; Teamsters Local No. 45 v. State
10 ex. rel Board of Personnel Appeals, 195 Mont. 272, 635 P.2d
11 1310, 110 LRRM 2012; City of Great Falls v. Young (Young
12 III), 686 P.2d 185, 119 LRRM 2682, 211 Mont. 13.

13 3. Pursuant to Section 39-31-406 MCA the
14 Complainant's case must be established by a preponderance of
15 the evidence before an unfair labor practice may be found,
16 Board of Trustees v. State of Montana, 103 LRRM 3090, 604
17 P.2d 770, 185 Mont. 89. See also Indiana Metal Products v.
18 NLRB, 1953 CA 7; 31 LRRM 2490, 202 F.2d 613 and NLRB v.
19 Kaiser Aluminum and Chemical Corporation, 34 LRRM 2412, 217
20 F.2d 366, 1954 CA 9.

21 4. Pursuant to Section 39-31-401 MCA it is an unfair
22 labor practice for a public employer to refuse to bargain
23 collectively in good faith with an exclusive representative.

24 5. Good faith bargaining is defined in Section
25 39-31-305 as the performance of the mutual obligation of the

1 public employer or his designated representative and the
2 representatives of the exclusive representative to meet at
3 reasonable times and negotiate in good faith with respect to
4 wages, hours, fringe benefits, and other conditions of
5 employment or the negotiation of an agreement or any question
6 arising thereunder and the execution of a written contract
7 incorporating any agreement reached. Such obligation does
8 not compel either party to agree to a proposal or require
9 the making of a concession. See NLRB v. American National
10 Insurance Company, 30 LRRM 2147, 343 US 395, 1952; NLRB v.
11 Bancroft Manufacturing Company, Inc., 106 LRRM 2603, 365 F.2d
12 492, 1981 CA 5; NLRB v. Blevins Popcorn Company, 107 LRRM
13 3108, 659 F.2d 1173, 1981 CA DC; Struthers Wells Corporation
14 v. NLRB, 114 LRRM 3553, 721 F.2d 465, 1980 CA 3.

15 6. Pursuant to the foregoing the Defendant was
16 obligated to bargain collectively in good faith with the
17 Complainant, Teamsters Local No. 190. That obligation to
18 bargain in good faith includes the duty to comply with the
19 grievance-arbitration procedure contained within the existing
20 Collective Bargaining Agreement, Chicago Magnesium Casting
21 Company v. NLRB, 103 LRRM 2241, 612 F.2d 108, 1980 CA 7; NLRB
22 v. South Western Electric Cooperative, Inc., 122 LRRM 2747,
23 794 F.2d 276, 1986 CA 7.

24 The grievance procedure is a part of the continuing
25 collective bargaining process, Steel Workers v. Warrior

1 Navigation, 46 LRRM 2416, 363 US 574, 1960. An employer has
2 the same obligation to bargain collectively over grievances
3 as over the terms of the agreement, City of Livingston v.
4 Montana Council No. 9, 100 LRRM 2528, 571 P.2d 374, 174 Mont.
5 421.

6 7. In ULP 44-81 James F. Forsman, IAFF Local No. 436
7 v. Anaconda Deer Lodge County and ULP 43-81 William M.
8 Converse, IAFF Local No. 436 v. Anaconda Deer Lodge County
9 (April 20, 1982) the Board of Personnel Appeals deferred
10 Unfair Labor Practice Charges to the Collective Bargaining
11 Agreement's grievance-arbitration procedure. In doing so the
12 Board formally adopted the Collyer doctrine. In Young, et al
13 v. City of Great Falls, 112 LRRM 2988, 198 Mont. 343, 646
14 P.2d 512 the Montana Supreme Court described that doctrine as
15 follows:

16 A "pre-arbitral deferral policy" was
17 first enunciated by the NLRB Collyer
18 Insulated Wire (1971), 192 NLRB 837, 77
19 LRRM 1931. There, quoting from Jos.
20 Schlitz Brewing Company (1968), 175 NLRB
21 23, 70 LRRM 1472, 1475, the NLRB found
22 "that the policy of promoting industrial
23 peace and stability through collective
24 bargaining obliges us to defer the
25 parties to the grievance-arbitration
procedures they themselves have
voluntarily established." Collyer at 77
LRRM 1936.

23 The National Labor Relations Board deferred to the
24 grievance-arbitration procedure in Teamsters Local 70 and
25 National Biscuit Company, 80 LRRM 1727, 198 NLRB No. 4, July

31, 1972 where the procedure was similar to that contained in the Collective Bargaining Agreement between the parties in this matter.

However, when arbitration is not available, the Board has jurisdiction and responsibility to interpret and apply the Collective Bargaining Agreement and to resolve disputes arising therefrom. See NLRB v. C & C Plywood Corporation, 64 LRRM 2065, 385 US 421.

8. As a general rule, the parties are encouraged and expected to exhaust their negotiated dispute resolution process prior to seeking relief elsewhere. "The Board is not the proper forum for parties seeking to remedy an alleged breach of contract," National Dairy Products Corporation and United Dairy Workers Local 83, 45 LRRM 1332, 126 NLRB No. 62. "Where an entire dispute can adequately be disposed of under the grievance and arbitration machinery, we are favorably inclined toward permitting the parties to do so..." Sheet Metal Workers Local 17 and George Koch Sons, 199 NLRB No. 26, 81 LRRM 1195, enforced 83 LRRM 2548, 1978 CA 1. See also Republic Steel Corporation v. Maddox, 58 LRRM 2193, 379 US 650; Brinkman v. Montana, 1 IER 1236, 729 P.2d 1301, 43 State Report 2163; United Paper Workers International Union v. Misco, Inc., 126 LRRM 3113, United States Supreme Court, December 1, 1987, No. 86-651.

9. Likewise, procedural arbitrability questions are

1 best resolved using the negotiated dispute resolution
2 machinery. See Local 4-447 v. Chevron Chemical Company, 125
3 LRRM 2232, 815 F.2d 338, 1987 CA 5.

4 10. It has been determined that the Complainant has not
5 exhausted the remedies available in the Collective
6 Bargaining Agreement's grievance-arbitration procedure.
7 Inasmuch as the Complainant failed to move the grievance on
8 to the next step, the Defendant has not refused to process a
9 grievance. Section 39-31-406(5) MCA requires that, if,
10 upon the preponderance of the evidence taken, the Board is
11 not of the opinion that the person named in the complaint has
12 engaged in or is engaging in the unfair labor practice, then
13 the Board shall state its findings of fact and shall issue an
14 order dismissing the complaint.

15 V. RECOMMENDED ORDER

16 It is hereby ordered that the above captioned Unfair
17 Labor Practice charges of Teamsters Local 190 against the
18 City of Billings be dismissed.

19 VI. SPECIAL NOTICE

20 Exceptions to these Findings of Fact, Conclusions of Law
21 and Recommended Order may be filed within twenty (20) days of
22 service thereof. If no exceptions are filed, this
23 recommended order shall become the final order of the Board
24 of Personnel Appeals. Address exceptions to the Board of
25 Personnel Appeals, P.O. Box 1728, Helena, Montana 59624-1728.

1
2 DATED AND ENTERED this 22nd day of June, 1989.

3
4 BOARD OF PERSONNEL APPEALS

5
6 By: 

7
8 ARLYN L. PLOWMAN
9 Hearing Examiner
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25